delivered to your client. Your clients have exported the timber themselves and the contract fee should have been paid long time ago. Hence, we have proceeded to obtain the judgment."

I find the assertion by the solicitors for the plaintiffs as in the first sentence underlined above cannot hold water because in all earlier correspondence plaintiffs had never given such an indication, on the contrary, as stated earlier, the plaintiffs had agreed that the matter be referred to an arbitrator.

In the above premises I find the case for the defendants (applicants) and their application is therefore allowed in the terms as stated in the order.

Order accordingly.

Solicitors: *Shelley Yap Leong, Tseu Chong Chia & Co.; Peter Lo & Co.*

SIM HIANG KIAW & ORS v. LEE HOI KIM CONSTRUCTION CO.

[O.C.J. (Tan Chiaw Thong J.) May 27, 1985]
[Kuching – Suit No. KG. 95 of 1984]

Arbitration – Defendants attended summons for directions without objection – Whether a step in proceedings – Application for stay of proceedings – Whether should be granted – Arbitration Act, 1952, s. 6.

The defendants applied for an order that all further proceedings in this action be stayed pursuant to section 6 of the Arbitration Act, 1952 on the ground that the parties had by an agreement in writing of October 12, 1979 agreed to refer to arbitration the matters in respect of which this section was brought. The sole issue for decision was whether the defendants, before applying to court for stay of proceedings and having the matters referred to arbitration, had taken "any other steps in the proceedings". The defendants had appeared and attended the hearing of the summons for directions without any objection or qualification.

Held, the defendants had already taken a step in the proceedings within the meaning of s.6 of the Arbitration Act, 1952. The application must be dismissed with costs.

Case referred to:

(1) *The County Theatres and Hotels Ltd.* v. *Knowles* [1902] 1 K.B. 480.

APPLICATION.

Loa Djin Liang for the plaintiffs.
Sulong Matjeraie for the defendants.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an application by the defendants for an order that all further proceedings in this action be stayed pursuant to section 6 of the Arbitration Act, 1952 on the ground that the parties have by an agreement in writing dated October 12, 1979 agreed to refer to arbitration the matters in respect of which this action is brought.

The application is supported by an affidavit affirmed by learned counsel for the defendants. There is an affidavit in opposition sworn by Mr. Joseph Lim Joon Hin, a member of the firm of advocates acting for the plaintiffs.

In my view, the matters at issue in this action would appear to be matters in respect of which, by virtue of the agreement mentioned earlier, the parties have agreed to refer to arbitration. The sole point to consider here, in my view, is whether in terms of section 6 of the Arbitration Act, 1952, the defendants before applying to this court to stay the proceedings and have the matters referred to arbitration, had taken "any other steps in the proceedings". The wording of this section is *in pari materia* with the corresponding English legislation except for the words "before a party has delivered any pleadings' which appear in the English legislation' but not in ours. Be that as it may, as mentioned, the point to consider is whether the defendants before making their application for stay had taken any other steps in the proceedings.

Arguments have been addressed to the court in relation to the filing of the Defence and Counterclaim and the application to the advocates for the plaintiffs for extension of time within which to do that, but in my view, irrespective of whether such actions taken by the defendants in this connection constitute a step taken in the proceedings, the crucial matter is whether by appearing and attending the hearing of the Summons for Directions without any objection or qualification, this constitutes a step taken by the defendants in the proceedings. In *Russell* on Arbitration (20th Edn.) page 172, para. 6, it is there stated that "The court has no discretion to stay, if the defendant allows the action to continue". In this connection, I am of the view that whether appearing at and attending the hearing of the Summons for Directions constitutes a step in the proceedings is governed by authority. I would in this connection refer to the case of *The County Theatres and Hotels, Limited* v. *Knowles*,[1] the headnote of which reads:

"An action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of documents. The defendant subsequently applied under s.4 of the Arbitration Act, 1889, for a stay of proceedings.

Held, that the defendant had taken a step in the proceedings, and was, therefore, not entitled to a stay.

In his judgment, Collins M.R. stated at pages 481 and 482:

"That which Order xxx has done is to enable the parties to obtain on one summons an order, with respect to all interlocutory proceedings to be taken in the action, which they might, before this rule took effect, have obtained on several distinct summonses. The parties appear before the master with, as it were, a blank sheet on which he may make this inclusive order. When he does so, with the acquiescence of both parties, there is just as much a step in the proceedings by each of the parties as if an order had been made on his separate application. The defendant might have objected to the making of the order on the ground of the agreement to refer differences, but he did not do so, and is not in a position to ask for a stay under s.4 of the Arbitration Act."

The position here in my view is similar. Whatever action might have been taken by the defendants before the hearing of the Summons for Directions, the fact remains that learned counsel for the defendants appeared at the hearing thereof and without objection allowed the hearing to proceed and conclude and the court made the various orders on this Summons included in which is an order for discovery which, in my view, would come within what was stated by Collins M.R. in the *County Theatres and Hotels* case that in this respect, there was just such a step in the proceedings by each of the parties as if an order had been made on his application with regard to discovery. I am therefore of the view that the situation here is covered by the case to which reference has been made. This principle is also referred to in *Russell* on Arbitration at page 173 where it is there stated that a defendant attending the hearing of a summons for directions on which an order was made or an undertaking given by the defendant has been held to be the taking of steps in the proceedings. It is not disputed that at the hearing of the Summons for Directions there was no indication by the defendants of any objection to the hearing thereof with the result that the Summons for Directions was heard and the various orders made by the court thereon.

In my view, in this connection, the pleading in para. 1 of the Defence and Counterclaim is no ground to justify the taking of the view that this constitutes a qualification to the unqualified appearance and taking part in the hearing of the Summons for Directions by the defendants.

For the reasons given, therefore, I am of the view and hold that because the defendants had already taken a step in the proceedings within the meaning of section 6 of the 1952 Act before making the instant application, it must necessarily fail. Accordingly, the application is dismissed with costs.

Application dismissed.

Solicitors: *Loa & Co.; Sulong Matjeraie & Co.*

SENG HUAT HANG SDN. BHD. v. CHEE SENG & CO. SDN. BHD.

[A.C.J. (Edgar Joseph Jr. J.) June 1, 1985]

[Penang – Civil Appeal No. 60 of 1982]

Practice and Procedure – Default judgment – Application to set aside – Subordinate Court Rules 1980, O.28, r.8(1).

The appellant had applied unsuccessfully to set aside a default judgment giving possession of certain premises in Penang occupied by it to the respondent, both parties being incorporated companies. The record showed that on the date fixed for hearing, although the suit had been thrice stood down to enable the appellant and/or its counsel to appear, neither did so. In the event, the respondent's counsel asked for judgment in default to be entered in favour of his client and on September 15, 1982, an order was made accordingly. A few days later the appellant applied to set aside the default judgment and upon refusal by the learned President, the appellant appealed.

Held, dismissing the appeal: (1) under the current Subordinate Courts Rules, whilst an explanation for absence was clearly relevant for the Court to consider in deciding whether or not to set aside a default judgment, it need not be a decisive consideration;

(2) what is crucial in applications of this sort is whether there was *evidence* before the Court disclosing a *prima facie* defence to the plaintiff's claim for possession or, in other words, a defence on the merits. For this purpose, the applicant need only disclose an arguable or triable issue;

(3) in this case neither counsel's affidavit nor the statement of defence was *evidence* showing a *prima facie* defence within the meaning of *Evans* v. *Bartlam*.[7]

Cases referred to:

(1) *Shaharuddin bin Abdul Rahman* v. *Satisah Ismail Sdn. Bhd.* [1982] 2 M.L.J. 79.